

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

CASE NO. 2013-CA-01944

LESLIE TERRY SINGLEY AND
BRENDA TAYLOR SINGLEY

APPELLANTS

VS.

TRINITY HIGHWAY PRODUCTS, LLC,
KEY LLC, ATWOOD FENCE COMPANY, INC.,
BRYSON PRODUCTS, INC., E-TECH TESTING
SERVICES, INC., CENTRAL FABRICATORS, INC.,
ENERGY ABSORPTION SYSTEMS, INC.,
AND JOHN DOES 1-10

APPELLEES

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

ON APPEAL FROM THE CIRCUIT COURT
OF THE SECOND JUDICIAL DISTRICT
OF HINDS COUNTY, MISSISSIPPI
CIVIL ACTION NO. 2009-39

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KEY, LLC AND ATWOOD FENCE
COMPANY, INC.

I. INTRODUCTION

The Singleys' Petition for Writ of Certiorari should be denied as to the claims against Key, LLC ("Key") and Atwood Fence Company ("Atwood") because the Court of Appeals correctly found that breach of duty and causation are absent as to these defendants. The Court of Appeals had before it the voluminous trial court record and briefs of counsel. The Court of Appeals also heard oral argument and considered Petitioners' Motion for Rehearing and Respondents' responses thereto. The Court of Appeals' decision in this case is not in conflict with prior decisions of this Court or of the Court of Appeals, does not involve a constitutional provision and does not involve a fundamental issue of broad public importance. Accordingly, the Petition for Writ of Certiorari should be denied.

II. FACTS PERTINENT TO CLAIMS AGAINST KEY AND ATWOOD

Key contracted with MDOT to serve as the general contractor on a fairly extensive redesign project of Interstate 20 at or near the Natchez Trace Parkway in Hinds County, Mississippi. Key entered a sub-contract with Atwood, wherein Atwood contracted to install the guardrails and signage on this project. As a part of this contract, Atwood installed a guardrail and Regent-C end terminal on the right side of westbound Interstate 20 just before the concrete pylons supporting the overpass of the Natchez Trace Parkway. The Regent-C end terminal was one of several types of approved end terminals that met the requirements of the plans and specifications provided by MDOT. [R. 1113]. The guardrail and Regent-C were installed exactly as set forth in the installation manual. [R. 1128, 1136, 1141-43, 1172 and 1177-78].

On February 14, 2008, Terry Singley was traveling westbound on Interstate 20 when he either fell asleep or passed out and crashed his truck into the guardrail and Regent-C end terminal at the

Natchez Trace overpass. Part of the guardrail entered Mr. Singley's vehicle and severed his leg at or about the right knee.

Terry Singley and his wife, Brenda Singley, filed this suit against the designers, testers and manufacturers of the Regent-C end terminal ("Trinity Defendants"). The Singleys also sued Key and Atwood as the installers of the Regent-C. The Singleys allege that Key and Atwood failed to use, construct and install the Regent-C as designed, or alternatively, caused it to deviate in a material way from the specifications or from identical units. The Singleys further allege that the installation deviated from the assembly instructions provided by the manufacturer and/or deviated from the plans and specifications provided by MDOT.

Key and Atwood filed motions for summary judgment on the basis that plaintiffs had no evidence to support these allegations that the Regent-C and/or guardrail were installed improperly and all testimony and evidence establishes that Key and Atwood constructed the guardrail and end terminal in accordance with the manufacturer's instructions and with the plans and drawings provided by MDOT. Key and Atwood breached no duty which was a proximate cause of the accident. Accordingly, the trial court and Court of Appeals correctly found that causation was lacking.

III. ARGUMENT

A. This Case Does Not Satisfy Any Criteria Which Would Warrant The Court Accepting A Writ of Certiorari.

The Mississippi Court of Appeals is ordinarily the court of final review and does not sit as an intermediate level appellate court to make only a preliminary determination of the merits of any appeal. The Mississippi Supreme Court has stated,

When the Court of Appeals came into existence in January of 1995, the scheme did not contemplate merely layering in another step in the appellate process. Indeed, under normal circumstances, that court bears the heavy responsibility for final review of trial court decisions. There is no further appellate review available to the litigant except through the exercise by this Court of its discretion to grant certiorari. MISS. CODE ANN. § 9-4-3(2) (Supp. 1997); M.R.A.P. 17(a). Although writs may be issued or denied in any case that this Court finds appropriate, they will ordinarily be granted where the Court of Appeals has rendered a decision in conflict with the decision of this Court, or that court has failed to consider a controlling constitutional provision, . . . or the decision involves a fundamental issue of broad public importance. M.R.A.P. 17(a). A simple request for a general review of the work of the Court of Appeals is not the proper station of a petition for writ of certiorari.

Skinner v. State, 700 So. 2d 1183, 1184 (Miss. 1997).

While the Singleys' Petition for Writ of Certiorari states that the Court of Appeals opinion conflicts with prior decisions of this Court and the Court of Appeals, the Singleys fail to cite to any applicable authority that supports this contention. Rather, the Singleys' Petition for Writ of Certiorari appears to be a simple request for a general review of the opinion of the Court of Appeals concealed as an allegation that the Court of Appeals somehow rendered a decision which was in conflict with a decision of this Court. Since the Singleys fail to meet the requirements of M.R.A.P. 17, the Petition for Writ of Certiorari should be denied.

**B. The Court of Appeals Correctly Found Breach
of Duty and Causation Absent as to Key and Atwood.**

The Singleys' Petition for Writ of Certiorari alleges that the Court of Appeals accepted "inadmissible arguments of Defendants' counsel" to reach the conclusion that plaintiffs' claims concerning the FHWA acceptance letter and installation of the Regent-C with only 112.5 feet of guardrail was without merit. However, plaintiffs are merely rehashing the same arguments previously considered and rejected by the Court of Appeals. In concluding that the FHWA acceptance letter issue was without merit, the Court of Appeals noted that the trial court "made no

findings of fact regarding the letter's intent.” Rather, the trial judge correctly “concluded that plaintiffs failed to ‘point to a specific breach of duty that caused injury.’” (Opinion, ¶ 28). This conclusion is supported by the record, as breach of duty and causation are absent.

Even if the FHWA acceptance letter required 148 feet of actual guardrail (which is denied), then Key and Atwood Fence were not privy to such a requirement. The manufacturer's installation manual was followed by Atwood in installing the Regent-C and it contained no mention of this alleged requirement. [R. 6255-6267]. In order for Atwood to have known of this limitation, Atwood would have to have conducted its own independent search of FHWA's records and found the actual acceptance letter. Clearly, no such duty exists. Plaintiffs have not cited any cases establishing such a duty and have designated no expert witness to testify that an installer owes such a duty. Moreover, MDOT was provided a copy of the FHWA acceptance letter and still approved the Regent-C for use on its roads. [R. 4020, 4025 and 4703]. Thus, Key and Atwood breached no duty.

Likewise, causation is absent. The FHWA acceptance letter states that the length requirement is “to shield a bridge parapet.” Here, Singley's vehicle stopped well before it got to the end of the guardrail. Further, the MDOT plans did not allow for more guardrail at this location. [R. 314]. Key and Atwood could not have installed 148 feet of actual guardrail even if they wanted to do so. It is undisputed that Singley was going to hit an end-terminal. It is pure speculation and conjecture to argue that a different end terminal would have yielded a different result as there is no admissible evidence to support this argument. Further, it was not foreseeable to Key/Atwood that the Regent-C would fail as alleged by plaintiffs. (If it had failed due to the length of guardrail, then plaintiffs may have a better argument against these defendants.)

Finally, the Court of Appeals did not engage “in improper credibility determination and advocacy on the part of the defendants” in analyzing the FHWA letter. Rather, the court reviewed the letter in conjunction with the data submitted to FHWA and the enclosures referenced and discussed in the acceptance letter. The test in which the “truck came to a stop straddling the rail approximately 45m downstream from the terminal” was Test 3-31. A summary of that test with the diagram showing the vehicle stopped approximately 45meters from the start of the Regent-C is found at R. 7199. The diagram clearly shows that the 45 meters is measured from the start of the Regent-C, not the end. The Court is not required to rely on Mr. Head’s interpretation of this letter when his interpretation flies in the face of the actual evidence before the Court. Regardless, breach of duty and causation are still absent even if the Court accepts Head’s erroneous interpretation of the letter.

The remainder of the Singleys’ Motion for Rehearing addresses the Singleys’ claims against the designer/manufacturer defendants (Trinity, BPI, E-Tech, Central Fabricators and EAS). To the extent that Key and Atwood failed to address an issue which the Court deems applicable to them, Key and Atwood join in and adopt the Response to Petition for Writ of Certiorari filed by the other defendants herein.

IV. CONCLUSION

The Court of Appeals correctly affirmed the trial court’s grant of summary judgment. Accordingly, the Petition for Writ of Certiorari should be denied.

Respectfully submitted

KEY, LLC AND ATWOOD FENCE
COMPANY, INC.

BY: /s/ George E. Abdo, III
OF COUNSEL

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CERTIFICATE OF SERVICE

I hereby certify that on **September 30, 2015**, I electronically filed the foregoing with the Clerk of the Court using the ECF system which sent notification of such filing to the following:

Richard Glassman, Esq.
Todd B. Murrah, Esq.
Ronna Kinsella, Esq.
W. Thomas McCraney, III, Esq.
Zachary Bonner, Esq.
Russell Brown, Esq.
Michael A. Heilman, Esq.
John W. Nisbett, Esq.
Roger C. Riddick, Esq.
Bradley S. Kelly, Esq.
Andy Lowry, Esq.

and I have mailed, via United States mail, postage prepaid, a copy to:

Honorable William A. Gowan
Circuit Court Judge, Hinds County
P.O. Box 22711
Jackson, MS 39225

/s/ George E. Abdo, III